SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 611

MISSISSIPPI POWER & LIGHT COMPANY,
Appellant,

vs.

CAPITAL ELECTRIC POWER ASSOCIATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi (App. A) is reported at ..... Miss. ....., 222 So. 2d 399 (1969). The opinion of the Chancery Court of Hinds County is set forth in Appendix B, *infra*, pp. A14-A18. The Order of the Mississippi Public Service Commission is set forth in Appendix C, *infra*, pp. A18-A32.

JURISDICTION

Capital Electric Power Association ("Association") instituted a proceeding before the Mississippi Public Service Commission ("Commission") to compel Mississippi Power & Light Company (appellant) to cease to serve an area certificated to Association under the Public Utility Act of 1956, Section 7716-01, *Recompiled Mississippi Code of 1942*, et seq., and to remove its facilities from the disputed area. Appellant claimed the non-exclusive right to serve the area under perpetual statutory franchises granted by the Mississippi legislature in 1860 and 1888. The requested relief was granted to Association in an order by the Commission, dated October 6, 1964. This order was affirmed by the Chancery Court of Hinds County, in a final decree dated November 20, 1967. Appellant appealed to the Supreme Court of Mississippi, which affirmed the Chancery Court. The judgment of the Supreme Court of Mississippi was entered April 21, 1969, and became final fifteen days thereafter. No petition for rehearing was filed. Notice of appeal was filed in the Supreme Court of Mississippi on July 3, 1969. This Court enlarged the time for docketing the appeal to September 10, 1969.

The jurisdiction of this Court to review the decision and judgment of the Supreme Court of Mississippi in this case is conferred by 28 U.S.C. § 1257(2). See *Russell* v. *Sebastian*, 233 U.S. 195 (1914); *Vicksburg Waterworks Co.* v. *City of Vicksburg*, 185 U.S. 65 (1902); *City of Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 206 U.S. 496 (1906); *Detroit United Railway* v. *People of the State of Michigan*, 242 U.S. 238 (1916); *Walla Walla* v. *Walla Walla Water Company*, 172 U.S. 1 (1898); *Charles River Bridge* v. *Warren Bridge*, 11 Peters 420 (1837); *Grand Trunk Western Railway Company* v. *Railroad Commission of Indiana*, 221 U.S. 400 (1911); *Appleby* v. *Delaney*, 271 U.S. 403 (1926).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 10, of the United States Constitution provides in part that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."

Section 7716-05, *Recompiled Mississippi Code of 1942;* Chapter 372, Section 5, the Public Utility Act of 1956, is set out in Appendix D, *infra*, pp. A33-A38.

Chapter 343, *Laws of Mississippi, 1860,* is set out in Appendix E, *infra*, pp. A38-A39.

Chapter 427, *Mississippi Laws of 1888,* amending the above, is set out in Appendix F, *infra*, pp. A40-A41.

Chapter 424, *Mississippi Laws of 1888,* is set out in Appendix G, *infra*, pp. A41-A44.

QUESTION PRESENTED

Where an electric distribution system was built and is being operated by appellant as a utility to serve "in the City of Jackson and its suburbs * * * [with] the right of way over all the streets and alleys of the City of Jackson and the public roads adjacent thereto * * *", pursuant to perpetual statutory franchises granted by a state (as evidenced by Chapter 343, *Laws of Mississippi, 1860* and Chapters 424 and 427, *Laws of Mississippi, 1888*, Appendices "E", "G", and "F" hereto), may the state impair the obligation of any of these franchises by later granting an exclusive franchise to another utility so as to prohibit the first utility from serving in an area later annexed to the City of Jackson.

STATEMENT

Prior to 1890, the State of Mississippi enacted the statutes (hereto annexed as Appendices "E", "F", and "G") setting forth the terms of the contracts at issue. These statutes, without any reservation of the State's right to amend or repeal the same, conferred upon appellant's predecessors in title perpetual contractual charter franchises. The Jackson Gas Light Company was franchised to supply "consumers" and "to erect poles along and through the streets and alleys" of the City of Jackson, Mississippi (App. E and F, Vol. IX, R. 1155, 1160); and the Light, Heat and Water Company was franchised "to sell such light * * * in the City of Jackson and its suburbs", with "* * * the right of way over all the streets and alleys of the City of Jackson and the public roads adjacent thereto * * *" (App. G, Vol. X, R. 1429).

In reliance on these franchises, an electric light plant was built in the City of Jackson, Mississippi and electric service has been continuously furnished to the inhabitants of the City. When appellant's franchises were originally granted, the area now in dispute (Exhibit 1, Vol. I, R. 19; Vol. VI, R. 811; cross-hatched in yellow) was about two miles from the westerly limits of the City of Jackson (Vol. IX, R. 1128). As the City of Jackson expanded, appellant constantly expanded its facilities. (For example, see Vol. XI, R. 1521, 1531, Exhibit 53). The City's gradual expansions from 1872 to 1960 are shown on the Association's Exhibit 14 (Vol. VIII, R. 986). The last expansion of the City before the one involved here (in 1960) was in 1949 (Vol. VIII, R. 982); and, prior to the 1960 expansion, the disputed area was immediately adjacent to the City limits on the west and north (Vol. VIII, R. 982)—substantially an island within the City (Vol. IX, R. 1129). As of the date of the last expansion on March 17, 1960, appellant was the

sole supplier serving the entire City of Jackson as it then existed (Vol. VIII, R. 983), in addition to six services, including the City of Jackson, within the disputed area.

Exhibit 3 (Vol. VII, R. 836) shows the appellant's services in the disputed area: 6 connected prior to March 29, 1956, none connected from then to March 17, 1960, and 19 connected from March 17, 1960 to July 28, 1964. Appellee has furnished electric service in the disputed area since September, 1939 (Vol. VII, R. 815).

In 1956, the Public Utilities Commission Act (Chapter 372, *Mississippi Laws of 1956;* Sections 7716-01, et seq., *Recompiled Mississippi Code of 1942;* hereinafter referred to as the "Act") (App. D), conferred grandfather certificates of public convenience and necessity upon utilities to continue to serve all facilities then being served by them, requiring only an application therefor. Appellee applied for and received a grandfather certificate (Exhibit 4, Vol. VII, R. 847; Vol. VII, R. 913) to serve the disputed area (described by metes and bounds). Appellant applied for and received a grandfather certificate to serve in accordance with the 1860 and 1888 statutory franchises, which were annexed as exhibits to its application[1] (Vol. X, R. 1495).

Prior to March 17, 1960, appellant was serving the entire City of Jackson as it then existed (Vol. VIII, R. 983). This proceeding was brought by appellee to enjoin appellant from serving customers not being served on March 29, 1956, the effective date of the Act, in the disputed area annexed to the City of Jackson on March 17, 1960.

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1. These legislative franchises were the only franchises relied upon by appellant in applying for a grandfather certificate, except for a franchise granted by Hinds County with respect to a transmission line bringing electricity through that county to the City of Jackson for distribution (Vol. X, R. 1471).

Appellant challenged appellee's assertion of an exclusive right to serve the area in question, and, *inter alia*, specifically contended that the perpetual legislative franchises were unimpairable obligations of contract which were protected by Art. I, Section 10, *United States Constitution*, as well as by the Fifth and Fourteenth Amendments thereto (Vol. V., R. 578; see also Vol. XI, R. 1617).

In enjoining appellant from serving in the disputed area, the Mississippi Public Service Commission made clear the sole ground on which it acted (Vol. XI, R. 1605):

> "We do not consider the above referred to laws granting corporate charters, the municipal franchise, street lighting contract, pumping plant contract or Hinds County franchises, to be germane to any of the issues in this cause. Therefore, we disregard them completely as we believe they have no bearing on this case. The Commission, however, does not decide on the validity of any of the acts of the Mississippi Legislature referred to granting of corporate charters municipal franchise of the City of Jackson, Hinds County franchises, the street lighting contract or pumping plant contract of the City of Jackson, nor attempt to interpret or construe any of their provisions. The Commission's decision is based solely upon the rights arising out of the certificates of convenience and necessity granted the two utilities in Docket No. U-44 and U-84. The first certificate does not include the disputed area. The second certificate does include the area in dispute."

The Chancery Court of Hinds County, in affirming the cease and desist order of the Commission, rejected appellant's claim of constitutional protection.

Appellant appealed to the Supreme Court of Mississippi. In Points I, II, and IV of its argument, appellant raised the issue of impairment of contract in violation of Article I, Section 10, of the United States Constitution.

In Point III, appellant argued that the protections of the Fifth and Fourteenth Amendments had been violated.

The Supreme Court of Mississippi rejected appellant's constitutional contentions based upon the 1860 and 1888 legislative franchises.[2] It first held, applying a doctrine of strict construction, that the enactments of 1860 and 1888 were for "* * * the single purpose of granting charters of incorporation and enumerating the powers of the corporations so chartered * * *", not giving rise to any contractual relationship between state and utility. 222 So.2d at p. 403.

Further, the court below held that the language of the 1860 and 1888 franchises could not be construed to include an area which, at those times, was neither "* * * a part of the City of Jackson, nor of its suburbs. * * *" 222 So.2d at p. 404.

Finally, the court below held that, assuming appellant's right to serve the disputed area was conveyed by the 1860 and 1888 charters, the right had been abandoned since appellant has served the area only since 1939 and has, since that date, only served six connections. 222 So.2d at p. 404.

THE QUESTION IS SUBSTANTIAL

1, This case plainly falls within the appellate jurisdiction of this Court under 28 U.S.C. § 1257(2). The Supreme Court of Mississippi, the highest court of the state in which a decision can be had, has affirmed rulings by the Commission and Chancery Court which have rejected appellant's contention that it has perpetual legislative franchises, protected by Article I, Section 10, of the

2. In the proceedings below, appellee challenged appellant's title to these franchises. The court below, in its decision, assumed the validity of appellant's title. 222 So. 2d at p. 402.

United States Constitution, which authorize it to serve the disputed area. The ruling of the Commission thus affirmed, holding that the 1956 certificate granted appellee under the Public Service Commission Act is exclusive, is a "statute" within the meaning of 28 U.S.C. § 1257(2). in *Live Oak Water Users' Association* v. *Railroad Commission of California*, 269 U.S. 354 (1926), this Court held (at p. 356):

> "The cause is here upon writ of error. Considering the circumstances disclosed by the record, we have no jurisdiction unless it affirmatively appears that in the court below there was duly drawn in question the validity of a statute of or an authority exercised under the State because of repugnance to the Constitution, treaties or laws of the United States. Jud. Code § 237, as amended Sept. 6, 1916. Under repeated rulings here, for jurisdictional purposes the order of the Commission must be treated as though an Act of the Legislature. *Lake Erie & West. R. R. Co.* v. *State Public Utilities Commission ex rel. Cameron*, 249 U.S. 422, 424, and cases there cited."

See also *Grand Trunk Western Railway Company* v. *Railroad Commission of Indiana*, 221 U.S. 400, 403 (1911); *Appleby* v. *Delaney*, 271 U.S. 403, 409 (1926).

Nor is this Court's appellate jurisdiction dissipated by the method of decision selected by the court below. As this Court noted in *Louisiana Railway & Navigation Company* v. *Behrman, Mayor of the City of New Orleans*, 235 U.S. 164, 170 (1914):

> "* * * It is equally well settled that, where the state court does give effect to later legislation which operates to impair the obligation of a contract if one exists, this court is not deprived of jurisdiction because the state court has put its decision upon the ground that the contract was not made, or that it was invalid, or that it has become inoperative. In

such a case, this court must determine for itself whether there is an existing contract. Otherwise, although it was the aim of the suit and the effect of the judgment to give validity and operation to the subsequent law and this court might be of the opinion that there was a valid contract which thereby would be impaired, it would be powerless to enforce the constitutional guarantee. * * *"

See also *Sultan Railway & Timber Company* v. *Department of Labor and Industries of the State of Washington*, 277 U.S. 135 (1928); *Lake Erie & Western Railroad Company* v. *State Public Utilities Commission of Illinois*, 249 U.S. 422 (1919).

Appellant contends that the decision below is entirely erroneous. The legislative franchises of 1860 and 1888, accepted and continuously implemented over many years by appellant, gave rise to a constitutionally protected contract. In no sense were these enactments mere corporate charters to be strictly construed against the corporation. Further, the scope of the franchise is clear. Appellant was authorized and committed to serve the City of Jackson as it grew. Finally, there is no warrant for the finding of abandonment by the court below.

A. **The Contractual Nature of the Franchises.** On February 10, 1860, the Legislature enacted Chapter 343, *Laws of Mississippi 1860*, (Appendix E, Vol. IX) R. 1155, which incorporated the Jackson Gas Light Company with power to "exercise all the rights and privileges which are usual to corporations within the scope and design of its creation", and to "make all needful rules and regulations for the management of said gas works, and fix the terms and conditions on which gas will be supplied to con-

sumers." The charter did not limit the "consumers" to be supplied.[3]

Necessarily, with plenary power in the State over streets, roads and public lands, there was an implied easement granted so that the franchise would be effectual to serve "consumers." See *Hodges* v. *Western Union Tel. Co.*, 72 Miss. 910, 914, 18 So. 84 (1895); see also *Russell* v. *Sebastian*; 233 U.S. 195, 207 (1914).

This charter was amended by Chapter 427, *Mississippi Laws of 1888*, approved March 7, 1888 (Appendix F, R. 1160, Vol. IX) which provided that:

> "* * * The said Jackson Gas Light Company is fully authorized and empowered to erect poles along and through the streets and alleys of said city on which to suspend its wires, lamps and other appurtenances * * *".

Appellant later acquired the franchise of the Light, Heat and Water Company. The charter of this company (Appendix G, Vol. X, R. 1429), Chapter 424, *Mississippi Laws of 1888*, approved February 23, 1888, p. 602, incorporated the company, its successors and assigns, and granted perpetual succession. The charter further provided in pertinent part:

> "SECTION 3. Be it further enacted, That said Company shall have power * * * *to sell such light*, heat and water on such reasonable terms as said directors may from time to time establish, *in the city of Jackson and its suburbs.* * * * *That the right-of-way over all the streets and alleys of the city of Jackson*

3. Under Chapter XXV, Sec. II, Art. 4, *Mississippi Code of 1857*, p. 291, the franchise was perpetual:

> "ART. 4. Every corporation created under this act, and all others not otherwise provided for, shall have succession for the time limited in the charter, and if no time be limited, then perpetual succession; * * *".

and the public roads adjacent thereto is hereby granted said company for its pipes, wires, poles and appliances for the purposes aforesaid * * *"/ (Emphasis supplied).

The evidence shows that pursuant to said grants, there was erected at the corner of Pearl and Congress Streets, in Jackson, an electric plant before 1890 (Vol. IX, R. 1165, 1171). The Jackson Gas Light Company, and the Light, Heat and Water Company, were specifically named as offerees, and their acceptance of these franchises by constructing facilities serving the entire City as it expanded constituted an unimpairable contract. The continued maintenance, construction, expansion and extension of facilities are "* * * acts of acceptance * * *" which create an "* * * irrevocable contract * * *" between appellant and the State. *Southern Bell Tel. & Tel. Co.* v. *Meridian*, 241 Miss. 678, 131 So.2d 666, 670 (1961); *Owensboro* v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58 (1913); *Fletcher* v. *Peck*, 6 Cranch. 87, 137 (1810). Compare *New Jersey* v. *Wilson*, 7 Cranch. 164, 166 (1812).

A charter which grants certain positive, and valuable rights thus becomes a contract, protected from impairment. *Dartmouth College* v. *Woodward*, 4 Wheat. 518 (1819). Operation of facilities serving the public under such a charter is both acceptance of the contract and sufficient consideration to enable a charter or franchise to obtain the status of a contract. *City Railway Company* v. *Citizens Railroad Company*, 166 U.S. 557 (1897); *Walla Walla* v. *Walla Walla Water Company*, 172 U.S. 1 (1898).

The *Southern Bell* cases are very much in point. (*Southern Bell Telephone & Telegraph Company* v. *City of Meridian*, 154 F. Supp. 736 (S.D. Miss., 1957), affirmed 256 F.2d 83 (5th Cir., 1958), judgment vacated and case remanded to District Court with instructions to hold the case, 358 U.S. 639 (1959); *Southern Bell Telephone & Telegraph*

Company v. *City of Meridian*, 241 Miss. 678, 131 So.2d 666 (1961).) In that case, the City of Meridian, acting under a 1956 State statute, imposed a two per cent charge on gross revenues for the use of the streets by Southern Bell. Southern Bell claimed that an irrevocable franchise was granted to its predecessors by an act of the Legislature of the State of Mississippi in 1886, which granted telephone companies the right to construct, maintain and operate telephone lines along the streets. The District Court said, at 154 F. Supp. 736, 740:

> "The question now arises whether or not the plaintiff in this case and its predecessors in title had accepted the privileges granted by the Laws of 1886 so as to constitute a contract between the State and the companies that is protected by the federal and state constitutions. The authorities are unanimous that it is a binding contract and to change its terms would be to impair the obligations of a contract and conflict with the U. S. Constitution. * * * This question has been before the Supreme Court of the United States, as well as many of the states, and all the courts hold that where there has been an offer and an acceptance by conduct, then a binding contract is created and the offer by the state to companies of benefits when accepted by any utility is irrevocable and is more than mere license to use the streets at the will of the legislature. * * *"

In the instant case, the State of Mississippi granted appellant's predecessors the right to supply electricity to the City of Jackson and its suburbs. There is no question that these grants were accepted: not only was a light plant built before 1890, but city-wide electric service has been furnished continuously to Jackson as it expanded. Such acceptance, under *Southern Bell*, created an irrevocable contract. The District Court in that case continued, at 154 F. Supp. 736, 743:

"* * * In 1890 plaintiff's predecessors were already doing business in the State and had acquired vested property rights that were irrevocable, and nothing but a clear intent to abandon those property rights or to relinquish them could deprive plaintiff or its predecessors of those rights. * * *"

The Court of Appeals affirmed the decision of the District Court. This Court did not rule on the merits of the case, but instructed the District Court to hold the case, pending decision by the Mississippi courts on unsettled questions of state law. The Mississippi Supreme Court found the two per cent charge unconstitutional, holding (241 Miss. at pp. 693-694):

"Miss. Laws 1886, Ch. 38, Sec. 1, quoted above, *constituted an offer by the State* to telephone and telegraph companies to use highways and streets for the purpose of providing citizens with telephone service without any requirement of paying compensation to either municipalities or the State. The continued maintenance of poles, lines and other facilities by its predecessors and appellant, after 1886, as well as the *continued construction, expansion, and extension of such lines on the public streets of Meridian constituted an acceptance* by Southern Bell and its predecessors of the offer of the right to use the streets, which was contained in the 1886 act. Under such circumstances, the great weight of authority holds that these acts of acceptance resulted in the creation of an *irrevocable contract* between appellant, on the one hand, and the State, on the other, which is protected from impairment by the contract clause of the State Constitution. * * *.

* * *

"* * * Sebastian and many other cases hold that the scope of the grant is not measured by the use of the streets at any given time, but as an entirety, by the undertaking invited and encouraged by the grant. * * *." (Emphasis supplied).

B. **The Scope of the Legislative Franchises.** Thus, the charters granted to appellant's predecessors in title constitute unimpairable contracts. Furthermore, these charters include the disputed area, and thus to deprive appellant of the right to serve this area is an impairment of the obligation of the contracts. Not only do the charters refer to the City of Jackson, but the Light, Heat and Water Company franchise (Appendix G) specifically granted the corporation the right "to sell such light * * * in the City of Jackson and its suburbs" and granted the "right-of-way over all the streets and alleys of the City of Jackson and public roads adjacent thereto * * *."

The court below sought to limit the clear purpose and language of these legislative franchises by measuring their scope as of the dates of enactment. The court below stated that it could not assume that the Legislature in 1860 and 1888 intended to convey a franchise indefinite in extent, which would include territory not then a part of the City of Jackson or a suburb of that city. 222 So.2d at p. 404. In other words, the court below found it unreasonable to assume that the legislative franchises were intended to expand as the city expanded and, on that basis, imposed a limitation on the franchises solely for the purpose of excluding the disputed area here in issue.

This basic assumption in the opinion below as to the static nature of the franchise is erroneous. In construing the scope of franchises granted, such as those here involved, to utilities, the only reasonable assumption is that the franchise is flexible and that it embodies a legislative recognition that the city or territory covered will grow. In *Illinois Central Railroad Company* v. *Chicago*, 176 U.S. 646 (1900), this Court observed that, in enacting legislation which referred to a city's boundary, the Legislature

presumably foresaw the possibility of growth. The Court said (176 U.S. at p. 665):

> "* * * The road, as originally constructed, ran through an almost uninhabited country, and yet a country which gave promise of a large population and of great cities being built up along the line of the road; and it is highly improbable that the growth of the State should not have been foreseen and contemplated in this legislation. * * *"

The assumption as to the legislative intent recognized by this Court in the *Illinois Central* case is the only reasonable basis for construing franchises such as here involved. In fact, appellant's service has expanded as the City of Jackson has expanded. And there is no rational basis for treating the 1960 expansion on any different basis from the earlier expansions of the city insofar as the reach of appellant's franchises is concerned.

In construing the scope of appellant's franchises, the court below also made reference to a principle that the corporate charter must be construed strictly against the corporation. Assuming that this principle has any application to a situation such as that here presented, it does not apply where, as here, the language of the franchises is clear. *Minneapolis* v. *Minneapolis Street R. Co.*, 215 U.S. 417, 427. Appellant is authorized to serve the City of Jackson and its suburbs. For some time prior to 1960, the disputed area had become a suburb of the city and, in 1960, became part of the city. In short, there is no ambiguity which calls into play a so-called rule of strict construction. Again, the past practice, the fact that appellant has expanded its facilities as the City of Jackson has expanded, demonstrates a constant construction of the language of the franchises contrary to the reading given by the court below.

The court below also sought to support its limited reading of appellant's franchises by reference to its prior decision in *Delta Electric Power Association* v. *Mississippi Power & Light Company*, 250 Miss. 482, 149 So.2d 504, appeal dismissed 375 U.S. 77 (1963). This case held that a *municipally*-granted franchise does not expand into an area later annexed to the municipality, because the municipality does not have the power initially to grant a franchise to an area outside its boundaries. Here, however, the franchises were granted by the sovereign State, not a municipality, with no such limitations on its power.

C. **The Finding of Abandonment.** The Supreme Court of Mississippi found that, even if appellant had a franchise which covered the disputed area, it had abandoned any rights it might have had thereunder. Appellant contends that such finding was improper. The Commission, which has exclusive original jurisdiction over the business and property of public utilities (Section 7716-04, *Recompiled Mississippi Code of 1942*) made no finding of abandonment. The Chancery Court of Hinds County, on initial review of the Commission's order, made no such finding. The finding was made for the first time in this proceeding by the court below.

Moreover, the finding is erroneous. Abandonment is a question of intent, and "where abandonment or waiver of a vested property right is claimed, the intention to abandon or waive it must be shown by 'full and clear' evidence." *Southern Bell Tel. & Tel. Co.* v. *Meridian*, 241 Miss. 678, 793, 131 So.2d 666, 675; see also *Baglin* v. *Cusenier Co.*, 221 U.S. 580, 597 (1911).

Here, the evidence is to the contrary. The disputed area was not annexed by Jackson until 1960 (Vol. VIII, R. 981). Thus, appellant should not be considered to have abandoned its right to serve a part of Jackson, until it be-

came vested by annexation in 1960. Furthermore, the Commission found that "* * * Mississippi Power & Light Company, has since June, 1960, built electric distribution facilities and provided services and offered to provide services in the disputed area" to numerous individuals in the disputed area, including "30 street lights" (Finding 15, pp. A28 and A29 of Order, Vol. XI, R. 1602, 1603). Further, the Commission found that appellant, unless ordered to cease and desist, would continue to offer to serve the disputed area (Finding 16, pp. A29-A30 of Order, Vol. XI, R. 1604). The evidence shows that these charter franchises were "* * * the only franchises * * *" specifically covering the City of Jackson and its suburbs claimed by the appellant from 1944 until March 29, 1956 (Vol. X, R. 1446).

In short, the evidence fully demonstrates appellant's intent to serve the City of Jackson and its suburbs in accordance with the full scope of its franchises.[4]

The situation is comparable to that before this Court in *Russell* v. *Sebastian*, 233 U.S. 195 (1914). There, this Court held that a grant of the privilege to lay pipes in the streets, which was not specifically confined in scope, was a grant for the entire city, and as new streets were built, the pipes could be accordingly extended, without additional grants. When the original grant was accepted, it "* * * became binding—not foot by foot, as pipes were laid, but as an entirety * * *". 233 U.S. at p. 207.

Appellant, therefore, contends in summary that it has a state-granted, contractual right to serve the area in dispute, and that the Commission's interpretation of the Public

4. In addition, it should be noted that a franchise must be considered in existence and not forfeited for non-use until there is a judgment of forfeiture in a direct proceeding instituted in the name of the state for that purpose. *Dorr* v. *Board of Levee Commissioners for Yazoo-Mississippi Delta*, (Miss. 1900) 28 So. 938. This is a question of state law. *New York Electric Lines* v. *Empire City Subway Co.*, 235 U.S. 179, 195 (1914).

Service Commission Act in its order enjoining such service is a State law which impairs the obligation of appellant's constitutionally protected contract. The Supreme Court of Mississippi upheld the validity of a State "statute" in upholding the order, and this decision is therefore directly appealable to this Court. *Detroit United Railway* v. *People of the State of Michigan*, 242 U.S. 238 (1916).

2. The question herein presented merits plenary consideration by this Court.

Long-range planning by governmental authorities and by the utilities involved is essential to the orderly development of the growing municipalities of our nation. As areas are annexed to municipalities, cities must furnish sewerage and water, and the utilities must expand their facilities to provide light, gas and water. In *Russell* v. *Sebastian*, 233 U.S. 195, 209 (1914), this Court quoted with approval the decision in *People ex rel. Woodhaven Gaslight Co.* v. *Deehan*, 153 N.Y. 528, 533 (1897), wherein it is held in part:

> "* * * 'It is well known that business enterprises such as the realtor is engaged in *are based upon calculations of future growth and expansion*. A franchise for supplying gas not only confers a privilege, but imposes an obligation upon the corporation to serve the public in a reasonable way. The realtor is bound to supply gas to the people of the town upon certain conditions and under certain circumstances, and it would be most unjust to give such a construction to the consent as to disable it from performing its obligations. It cannot reasonably be contended that the realtor is obliged to apply for a new grant whenever a new street is opened or an old one extended, as would be the case if the consent applied only to the situation existing when made. When the right to use the streets has been once granted in general terms to a corporation engaged in supplying gas

> for public and private use, such grant *necessarily contemplates that new streets are to be opened and old ones extended from time to time, and so the privilege may be exercised in the new streets as well as the old.*'" (Emphasis supplied).

The State of Mississippi, nearly one hundred years ago, foresaw that its capital city would grow, and granted these franchises to insure that the central station electricity requisite for municipal growth would be furnished by the grantees of the franchises.

Note that said in 1895 by the Supreme Court of Mississippi as to the water portion of one of these very franchises in *Light, Heat & Water Co.* v. *City of Jackson*, 73 Miss. 598, 643, 19 So. 771:

> "We know that the machinery, mains and appliances required for supplying the city with water are costly to begin with, and of relatively little value if removed when once located. Permanency of the plant is essential to the realization of any profit in the enterprise, and in cities having no greater population than that of Jackson, the use of water for municipal purposes would probably be a prerequisite to secure the investment of the capital necessary to the construction of the plant."

As the records of this Court show, similar contractual franchises have been granted across our country to solve the problem of furnishing utility service to our growing cities. See cases collected in *Russell* v. *Sebastian*, 233 U.S. 195, 204 (1914).

As characterized by this Court in *Frost* v. *Corporation Commission of the State of Oklahoma*, 278 U.S. 515, 519, 73 L.ed. 483, 487 (1929), such a right to furnish utility service "* * * is not a mere license, but a franchise, granted by the state *in consideration of the performance of a public service*; and as such it constitutes a property right within

the protection of the 14th Amendment." In order to raise the money necessary to construct the facilities for the initial central station power plant and for the distribution to the municipality as it expands, millions of dollars are necessarily borrowed on the faith of such franchises. See *Owensboro* v. *Cumberland Telephone & Telegraph Co.*, 230 U.S. 58, 65 (1913); *City of Louisville* v. *Cumberland Telephone & Telegraph Co.*, 224 U.S. 649, 663 (1912). The ability to make such loans is gravely jeopardized by this decision. If a state may break its solemn contracts after the other party to those contracts has performed them for many years, then the entire system of utility financing based upon long-range planning and orderly expansion of service under mortgages on contractual franchises will have been seriously impaired. Compare *Boise Artesian H. & C. Water Co.* v. *Boise City*, 230 U.S. 84, 91 (1913).

These franchises have been mortgaged on the public records since 1944 (Ex. 48, Vol. X, R. 1447, 1470) and in 1944 were claimed in the prospectus filed with the Securities and Exchange Commission (Ex. 49, Vol. X, R. 1459) as to the outstanding bonds secured by this mortgage. The error of the lower tribunals, from the standpoint of public policy, therefore is magnified by the erroneous refusal of the Commission to join as indispensable parties the Trustees under the deed of trust covering these franchises. *Thayer* v. *Life Association of America*, 112 U.S. 864, 865. See also *Old Colony Trust Co.* v. *Omaha*, 230 U.S. 100, 122; *Mississippi Power & Light Co.* v. *Coldwater*, D.C. Miss., 168 F. Supp. 463, 478. The rights of these trustees and their bondholders under these franchises have been effectively destroyed by the decision in a proceeding to which they were not even parties; and that filed with the Securities and Exchange Commission has thereby been retroactively rendered untrue.

For the foregoing reasons, we respectfully submit that jurisdiction exists in this Court to decide on appeal the substantial questions presented and that this Court should rectify the grave errors apparent in the record; but, if the proper remedy is by certiorari, then it is respectfully prayed for in accordance with law.

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CERTIFICATE OF SERVICE

I, Joshua Green, one of the attorneys for the Appellant herein and a Member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served printed copies of the foregoing Jurisdictional Statement on the Appellee in the manner following:

By mailing 2 copies thereof in a duly addressed envelope, with postage prepaid, to T. Harvey Hedgepeth, Esquire, Deposit Guaranty National Bank Building, Jackson, Mississippi 39201.

I further certify that I have caused to be mailed, postage prepaid, forty (40) printed copies thereof to the Clerk, United States Supreme Court, Washington, D.C. 20520.

This the 16th day of September, 1969.

.....

JOSHUA GREEN
800 Electric Building
Jackson, Mississippi 39201
One of the Attorneys for Appellant

APPENDIX

APPENDIX A

[Key]

MISSISSIPPI POWER & LIGHT COMPANY,
a Mississippi Corporation

v.

CAPITAL ELECTRIC POWER
ASSOCIATION.

No. 45102.

Supreme Court of Mississippi.
April 21, 1969.

SMITH, Justice.

Mississippi Power & Light Company appeals from a decree of the Chancery Court of the First Judicial District of Hinds County affirming a "cease and desist" order entered against it by Mississippi Public Service Commission upon petition of appellee, Capital Electric Power Association.

Capital Electric's petition, filed October 4, 1960, charged Mississippi Power with having invaded its service area, previously certificated to Capital Electric by the Commission on September 21, 1959, under the provisions of Chapter 372, Mississippi Laws of 1956, by constructing, maintaining and operating electric lines and other facilities in the area and by serving and offering to serve customers therein.

The area in question lay west of the City of Jackson and became a part of that city on March 17, 1960, through extension of its municipal boundaries.

On October 27, 1960, Mississippi Power answered and filed a cross petition claiming the right to serve the area, the City of Jackson was permitted to intervene on Febru-

ary 7, 1961, and afterward various pleadings, motions and exhibits were filed by the several parties.

In substance, the position of Mississippi Power, as reflected by its pleadings, was that, while the area, prior to its annexation, had been certificated to Capital Electric with its consent, in consenting it had expressly reserved the right to serve this or any other territory which might afterward become annexed to the City of Jackson, wherein Mississippi Power held a franchise.

As stated, the boundaries of the City of Jackson were extended on March 17, 1960, so as to include the area in question and Mississippi Power claimed that its franchise was thereby extended to include it; and, moreover, asserted that it was entitled to "follow the customer" (the City of Jackson) into the added area.

By way of affirmative defenses, Mississippi Power pleaded, *inter alia*, its municipal franchise granted on May 26, 1956, and averred that Capital Electric had no municipal franchise. Mississippi Power also asserted a "grandfather" right to the added territory by virtue of its service within the City of Jackson as it existed on the effective date of 1956 Act and prior to the expansion of the municipal boundaries on March 17, 1960.

By cross petition Mississippi Power demanded that Capital Electric be required to discontinue serving the area certificated to it but which now lay within the expanded municipal boundaries of the City of Jackson. There followed several hearings, mostly involving questions relating to pleadings, and a period of relative quiescence.

At the time there were pending on appeal to this Court two cases presenting substantially analogous factual situations. Those two cases have since been decided and are sometimes referred to as the "Winona" case and the "Clin-

tion" case, in reference to the municipalities where they arose.

On February 11, 1963, this Court decided "*Winona*," reported as Delta Electric Power Ass'n v. Mississippi Power & Light Co., 250 Miss. 482, 149 So.2d 504 (1963) and on March 11, 1963, decided "*Clinton*," reported as Capital Electric Power Ass'n v. Mississippi Power & Light Co., 250 Miss. 514, 150 So.2d 534 (1963).

In both *Winona* and *Clinton*, Mississippi Power held municipal franchises and contended that, when the municipal boundaries were extended, their service area was likewise extended, even though such an extension encroached upon an area previously certificated to another utility. In both cases this contention was rejected by the Court.

Here, as in *Winona* and *Clinton*, Mississippi Power held a franchise to serve an area comprising a municipality, and as in *Winona* and *Clinton* there was an extension of the municipal boundaries so as to include within the municipality territory previously certificated to a power association. As in *Winona* and *Clinton*, Mississippi Power claims the right to serve that territory by reason of its incorporation into the municipality. Since the opinions in *Winona* and *Clinton* contain clear statements of the issues and of the Court's reasons for rejecting Mississippi Power's assertion of the right to serve the added territory, we will not repeat here what was said in those cases.

After the decisions in the *Winona* and *Clinton* cases were announced the Commission, considering that such decisions were controlling as to the issues, on motion, struck the answers of Mississippi Power and of the City of Jackson. Thereafter, however, with leave of the Commission, Mississippi Power filed an amended answer in which it brought forward its original contentions and also pled that

it had succeeded to the rights of Jackson Gas Light Company, under a corporate charter granted it by the Mississippi Legislature in 1860 and amended in 1888, as well as to those of Light, Heat and Water Company under a charter granted it in 1888. It pled certain rights granted it by the Board of Supervisors of Hinds County permitting use of highway and road rights-of-way for construction of power lines. Also pleaded were other matters which we consider it unnecessary to detail here. The City of Jackson filed no further answer and appears to have abandoned the case.

Mississippi Power's argument that its municipal franchises expand coextensively with municipal boundaries into areas previously certificated to another utility was rejected in both the *Winona* and *Clinton* cases.

Upon conclusion of the hearing, the Commission found, therefore, that the decisions in *Winona* and *Clinton* controlled and issued its cease and desist order against Mississippi Power as prayed by Capital Electric. Mississippi Power appealed to the Chancery Court of the First Judicial District of Hinds County where the Commission's order was affirmed.

Mississippi Power contends that this was error, that *Winona* and *Clinton* are not controlling, and that rights possessed as successor to Jackson Gas Light Company and Light, Heat and Water Company under the 1860 and 1888 charters distinguish this case.

In its brief filed with this Court, Mississippi Power now states that its "principal contention is that it holds nonexclusive, valid electric franchises covering the disputed area; and that these grants from the State are enforceable and constitutionally protected."

This contention is based upon an assertion that Mississippi Power is the lawful successor to Jackson Gas Light

Company and Light, Heat and Water Company, and is the owner of their respective franchises. This claim is supported by a deraignment of title attached to the brief. The validity of Mississippi Power's title is challenged by Capital Electric but for the purposes of this opinion it will be assumed that it is good.

The charter of Jackson Gas Light Company was granted by the Mississippi Legislature by Chapter CCXLIII, February 10, 1860. This act incorporated an existing gasworks located in the City of Jackson, Chapter 427, Mississippi Laws of 1888, amended the charter previously granted so as to authorize electric service as follows:

> SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That the charter of the Jackson Gas Light Company be and the same is hereby amended as follows: The said Jackson Gas Light Company is fully authorized to construct, own and operate an electric light and power plant in the city of Jackson, in connection with the present gas plant; and it is fully authorized and empowered to erect poles along and through the streets and alleys of said city on which to suspend its wires, lamps and other appurtenances; *provided*, that nothing herein contained shall be construed as legalizing said company's occupation of a part of Market Square, if the same has not already been legalized.

Light, Heat and Water Company was incorporated under Chapter 424, Laws of Mississippi 1888, Section 3, of which is as follows:

> SEC. 3. Be it further enacted, That said company shall have power to own such lands and all such factories, reservoirs and mechanical devices or appliances as may be deemed proper by the directors of said company to conduct successfully said business and operate the franchises hereby conferred and to locate them at

points most advantageous to its business, and to manufacture and produce any and all kinds of artificial light and heat, whether made from fuel or power, electricity or otherwise; and to store and supply for public and private use water; and to sell such light, heat and water on such reasonable terms as said directors may from time to time establish, *in the city of Jackson and its suburbs*; and to own, use and operate all machinery, engines, conduits, wires, pipes and all appliances necessary or proper to the business of said company. That the right-of-way *over all the streets and alleys of the city of Jackson and the public roads adjacent thereto is hereby granted said company for its pipes, wires, poles and appliances for the purposes aforesaid*, and authority and right is hereby conferred on said company or its agents to dig the same, to lay their pipes beneath said streets and reads and to repair same, and to erect poles upon which to suspend their wires or lights, but such pipes and poles and wires must be so arranged that the use of said streets and roads as public highways shall not be materially impaired; that said company may buy, sell and deal in for profit, all the appliances to its said business and also do gas-fitting and plumbing for hire. (Emphasis added.)

There is little, if any, dispute as to the facts. In 1888 the disputed area lay west of the City of Jackson and was two miles from it at the nearest point. In 1921 this area was one mile distant at its nearest point. In 1925 the boundary of the City of Jackson had approached to within one-half mile. In 1949 the City expanded its boundaries so as to touch the area on the east side but did not include any part of it.

In 1915 the area was woodland and farmland. There was one residence either on or near the disputed area. There was one farm on it which later became a dairy farm. A part of the disputed area could be reached from Jackson in 1915 and for years afterward only by a dirt or "dry weather" road. In the 1920's and later, this road was almost

always impassable in winter. There was a swampy area and a creek which could hardly be crossed in the winter with a horse and buggy. Between this area and the City of Jackson was wooded, open country with a few little shanties. These conditions continued without significant change until U.S. Highway 80 was opened between 1938 and 1940. At that time some development began but the area was still one-half mile distant at its closest point from the City of Jackson.

In its brief, Mississippi Power concedes that Capital Electric has furnished the electric service in the disputed area since September, 1939, which was the earliest time that such service was furnished by anyone. Also, it is conceded that Capital Electric had 134 connected services prior to March 29, 1956; 73 additional connections between March 29, 1956, and the city expansion on March 17, 1960; and 34 connected from that date to July 28, 1964. It is also conceded by Mississippi Power that its own services in the disputed area were limited to 6 connections prior to March 29, 1956; none connected from that date to March 17, 1960; and, 19 connected from March 17, 1960 to July 28, 1964.

Mississippi Power contends; however, that the charters, granted by the Legislature in 1860 and 1888, to its predecessors, give it the right to serve the added territory. They assert that these charters constitute binding, irrevocable, contractual obligations of the State of Mississippi granting it the right to do so, and are within the protection of the nonimpairment of the obligation of contracts clause of the constitution, citing Southern Bell Telephone & Telegraph Company v. City of Meridian, 241 Miss. 678, 131 So.2d 666 (1961).

Southern Bell, supra, involved Chapter 38, Laws of Mississippi of 1886. In a preamble, the Legislature declared the purpose of the act: "AN ACT to encourage and

facilitate the construction of Telegraph, Telephone and other like lines in the State of Mississippi." The act was designed to induce telegraph and telephone companies to come into the State and extended an invitation to them to build lines along all public roads, streets and waters of the State, free of charge. At the time, the telegraph had come into general use; but the telephone had not been invented until 1876, and was a relatively new device. Southern Bell's predecessor had accepted the offer extended by the act and had built lines in the City of Meridian and elsewhere. In *Southern Bell, supra*, the Court held that the act contained a clear offer or invitation expressly predicated upon the proposition that companies accepting it might use the public ways free of charge, and that Southern Bell had accepted it. As a consequence, the Court said that Chapter 372, Mississippi Laws of 1956, Section 5(e), insofar as it required payment of rent for use of the streets, violated the nonimpairment clause of the Constitution because the offer and acceptance constituted a contract. We do not think that the charters of incorporation embody an offer such as that extended by the statute in *Southern Bell*, nor that there was a contract such as that found by the Court to exist in that case.

[1] In this case, the 1860 and 1888 Acts were for the single purpose of granting charters of incorporation and enumerating the powers of the corporations so chartered, by a method then in common use for that purpose. Moreover, while corporate charters possess contractual characteristics, they are to be strictly construed against the corporation.

Mississippi-Gulfport Compress & Warehouses, Inc. v. Public Service Commission, 189 Miss. 166, 177, 196 So. 793, 795 (1940) held:

> In the case of Williamson v. Gordon Heights Ry. Co., 8 Del.Ch. 192, 40 A. 933, 934, its rule is

thus stated: "There is no rule of construction more fixed and unyielding than that requiring strict construction of grants to corporations." That case approved this statement: "In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation. This is the rule sustained by all the courts in this country and in England."

In our own state this rule obtains as announced in Abby v. Billups, 35 Miss. 618 at page 630, 72 Am. Dec. 143.

Here the corporations organized and chartered were authorized in 1888 to manufacture and sell electric energy in the City of Jackson or in the City of Jackson and its suburbs." The disputed area then lay some two miles outside the city, was virtually inaccessible and unin-habited. It was not a part of the municipality nor can it be argued that it was a part of its suburbs. In any event neither Jackson Gas Light Company, Light, Heat and Water Company nor Mississippi Power & Light Company provided or attempted to provide, electric service to the area from 1888 to 1939, a period of 51 years. In 1939, Capital Electric began supplying the area with this service. Since 1939 and until the present dispute arose, Capital Electric has supplied the area with adequate electric service while Mississippi Power made no objection and installed only 6 scattered services.

[2-4] We are unable to attribute to the Legislature a purpose, in granting the 1860 and 1888 charters to place in limbo in perpetuity, as far as electric service was concerned, an area of indefinite extent surrounding the City of Jackson in every direction. The language of the 1888 Act "Jackson and its suburbs" does not warrant the assumption that there was a grant in perpetuity of an implied power to serve, when, as and if it chose to do so, a

territory which was neither a part of the City of Jackson, nor of its suburbs. If it might be assumed that a right to serve the area was implicit in the early charters it carried with it a corresponding obligation to provide service. If such was the case, neither Mississippi Power nor its predecessors made any attempt to fulfill that obligation for 51 years prior to 1939 when Capital Electric began providing the service. Moreover, it had made only 6 scattered connections from 1939 until the present dispute arose. If the right to serve the area ever existed under the charters, it was lost through abandonment, and Capital Electric was entitled to the "grandfather" certificate granted it by the Commission under the 1956 Act.

[5] Whatever effect the 1860 and 1888 charters may have had in placing unalterably and forever, the right to serve the "City of Jackson and its suburbs," in the two early corporations and their successors, the area now in dispute clearly was neither within the City of Jackson nor a part of its suburbs. The language and purposes of the charters do not permit any reasonable inference that it was within the contemplation of the Legislature that authority granted to serve an urban area described as "Jackson and its suburbs" would also include unsettled country land lying two miles away. Mississippi Power and its predecessors wholly failed to serve the area or to assert any right to do so following the grant of the charters in 1888. Since 1939 it has been adequately served by Capital Electric. These circumstances are persuasive upon the proposition that no such power under the charters was considered to have existed.

In the *Winona* case the Court said:

> On the effective date of the Public Utility Act, and before the disputed area came within municipal limits, the legislature by that Act vested in Delta a

right to receive for it a grandfather certificate. This was a valid exercise of the police power of the state. The municipal franchise and street lighting contract were not preexisting rights as to the area involved in this suit, because before they could attach, if at all, the certificate issued to Delta by the Commission under the Act attached to the disputed area. There is no constitutional objection to this interpretation. On the contrary, to deprive Delta of the disputed area as a service territory would not only be contrary to the mandatory terms of the statute, but would also be violative of the certificate granted to it by the Commission. See Miss. Laws 1956, Ch. 372, Sec. 26(d) (scope of review). 250 Miss. at 511-512, 149 So.2d at 514.

[6] We are unable to accord a broader scope to the right claimed under the early corporate charters to serve the City of "Jackson and its suburbs" than is accorded to a similar grant to a utility under the 1956 Act. In neither case will the expansion of the area, whether it comprises a municipality and its suburbs or only the municipality itself, warrant an invasion of an area previously certificated to and being served adequately by another utility.

[7] It may be of interest to note that the early charters included heat, light and water service as well as electric service, although, of course, no right to provide water and gas service in the territory is involved here. We are unable to attribute to the Legislature in granting the 1860 and 1888 charters a purpose to preclude a subsequent grant of service rights for electric, gas or water service in any territory that might at any time thereafter be annexed to the City of Jackson, in perpetuity.

In Zeigler v. Zeigler, 174 Miss. 302, 310, 164 So. 768, 770 (1935) the Court said:

> In construing statutes, the chief desire of the courts is to reach the real intention of the Legislature,

and knowing this to adopt that interpretation which will meet the real meaning, though such interpretation may be beyond or within, wider or narrower, than the mere letter of the statute. Unthought of results must be avoided if possible, especially if injustice follows, and unwise purpose will not be imputed to the Legislature when a reasonable construction is possible. Kennington v. Hemingway, 101 Miss. 259, 57 So. 809, 39 L.R.A. (N.S.) 541, Ann.Cas. 1914B, 392; Leaf Hotel Corporation v. City of Hattiesburg, 168 Miss. 304, 150 So. 779; Canal Bank & Trust Co. v. Brewer, 147 Miss. 885, 113 So. 552, 114 So. 127; City of Holly Springs v. Marshall County, 104 Miss. 752, 61 So. 703; Gunter v. City of Jackson, 130 Miss. 637, 94 So. 844; Huber v. Freret, 138 Miss. 238, 103 So. 3.

The case of Capital Electric Power Ass'n v. Mississippi Power & Light Company, 240 Miss. 139, 150-151, 125 So. 2d 739, 743 (1961) was the first decision of this Court under the Act of 1956 and in it the Court said:

> It is clear from Chapter 372, Laws of 1956, that it was the intention of the legislature that facilities of one utility should not be duplicated in the same area * * * The manifest policy of the act is to prevent duplicating and overriding facilities and certificates. * * * An existing utility within the certificated area has the right and duty to provide the service, and must be given that opportunity. If it fails, the commission can award another franchise to another utility. Section 5(c) and (f) makes this clear. (Emphasis added.)

[8] Finally, it is argued that because of its contract with the City of Jackson to provide street light and other services that it has the right to follow the customer into the added territory. In Capital Electric Power Ass'n v. Mississippi Power & Light Co., 218 So.2d 707 (Miss. 1969) this proposition was rejected.

We are of the opinion that the order of the Mississippi Public Service Commission, as affirmed by the chancellor, was amply supported by evidence, was in accord with the law of the case, and that the decree appealed from should be affirmed.

Affirmed.

ETHRIDGE, C. J., and RODGERS, BRADY and ROBERTSON, JJ., concur.

APPENDIX B

W. T. Horton
Chancellor, Division 1
Fifth Chancery Court District
of the
State of Mississippi
Jackson 39205

Flora Evans
Court Reporter
Tel: 354-3147
Area Code 601

Chancery Court Building
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20th October 1967

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Mr. Sherwood W. Wise
Electric Building
Jackson, Mississippi

Mr. T. Hickey Hedgepeth
Deposit Guaranty National Bank Building
Jackson, Mississippi

Re: Mississippi Power & Light Company v.
Capital Electric Power Association

Gentlemen:

It is my opinion that when the City of Jackson annexed its municipal limits wherein it included the disputed area, that being zoned under a valid franchise from the Public Service Commission to Capital Electric Power Association, the said disputed area was included subject to said franchise and did not affect in any way the rights of said Power Association to serve said disputed area.

I cannot reasonably construe the Act of 1888 to fix the territorial area for the Mississippi Power & Light Company. This being my firm judgment, I am of the opinion that the "Clinton" and "Winona" cases are then controlling in the case at bar.

The order of the Commission is affirmed, and a decree may be taken accordingly.

I enjoyed having you gentlemen in our court in this case. Your oral arguments and briefs were excellent.

Respectfully submitted,

W. T. Horton
Chancellor

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 86,779

MISSISSIPPI POWER & LIGHT COMPANY
Appellant

vs.

CAPITAL ELECTRIC POWER ASSOCIATION
Appellee

Final Decree

(Filed November 20, 1967)

This cause came on to be heard upon the appeal of Mississippi Power & Light Company from the final order of the Mississippi Public Service Commission, dated October 6, 1966 in Cause No. U-264, upon the docket of said Commission granting and allowing the petition of Capital Electric Power Association for a cease and desist order requiring Mississippi Power & Light Company to cease and desist furnishing electric distribution facilities and providing

electric service in a particularly described portion of Capital Electric Power Association's certificated service area allotted and granted unto it by said Commission in its Docket No. U-84 by order dated September 21, 1959, being a so-called "Grandfather Certificate" granted and issued under Section 3(b) of the Public Utility Act of 1956 (Chapter 372, Mississippi Laws of 1956, hereinafter referred to as the "Act"), said particularly described area being located in Hinds County and within the corporate limits of the city of Jackson, and requiring that said Mississippi Power & Light Company take down and remove the electric distribution facilities built by it in said particularly described area (there being excluded from the requirements of said order, however, those distribution facilities built and those services rendered by Mississippi Power & Light Company in said particularly described area prior to March 29, 1956, the effective date of the Act); said order also overruling plea of res judicata filed by said Mississippi Power & Light Company, and the court having heard and considered said appeal upon the record made before the Commission and filed herein and having read and considered the briefs of all parties and having heard and considered the oral arguments of counsel for all parties and having taken said appeal under advisement for the rendering of a decision after further and full consideration thereof, and the court having fully considered said appeal and being fully advised in the premises, from the entire record and applicable law makes the following findings and conclusions:

1. Appellant and appellee are each and both public utilities in the field of electricity under the provisions of the Act.

2. The court has full jurisdiction of the parties and subject matter of this appeal and is authorized to do and adjudicate all that is done and adjudicated herein.

3. The findings of the Commission in the order appealed from were made in sufficient detail to enable the court on appeal to determine the controverted questions presented by the proceeding and the basis of the Commission's conclusions as appears from said order. The action of the Commission in granting the order appealed from was not erroneous legally; was supported by more than substantial evidence, was not contrary to the weight of the evidence, was not in excess of the statutory authority or jurisdiction of the Commission; nor does it violate statutory or constitutional rights of appellant.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. The aforesaid final order of the Mississippi Public Service Commission in its Docket No. U-364, dated October 6, 1964, be and the same is hereby adjudged to be supported by more than substantial evidence, not contrary to the weight of the evidence, not in excess of the statutory authority or jurisdiction of the Commission, not erroneous legally and not violative of statutory or constitutional rights of appellant, whether those claimed under Section X of Article I (against the impairment of the obligation of contracts) and Section 1 of Amendment XIV (against deprivation of property without due process of law) of the Constitution of the United States and Sections 14 and 16, Mississippi Constitution or other, and said order be and the same is hereby affirmed.

2. The opinion of the court in the form of a letter addressed to counsel for the parties, dated October 30, 1967, and filed herein on Nov. 20th, 1967, is hereby made a part of the record in this cause.

3. All costs in this cause are hereby assessed against appellant, for which let execution issue.

ORDERED, ADJUDGED AND DECREED, this November 20th 1967

Chancellor

Approved as to Form

Green, Green and Cheney

By /s/ Garner W. Green

Wise Carter and Child

By /s/ James K. Child, Jr.

Of Counsel for Appellant,

Mississippi Power & Light Company

APPENDIX C

MISSISSIPPI
PUBLIC SERVICE COMMISSION
JACKSON
U-864
CAPITAL ELECTRIC POWER ASSOCIATION
VS
MISSISSIPPI POWER & LIGHT COMPANY

In re: Petition for Cease and Desist Order Against Mississippi Power & Light Company from Rendering Service to Harlow's Boat Center, Approximately 800' of Single Phase Distribution Lines Along Lynch, Burch, Craft, Washington, Booker, McLean, Dewey and Gibralter Streets, Serving 30 Street Lights, 4300 Block of Lynch Street, Serving Campbell Construction Company

Cease and Desist Order

On October 4, 1966, Capital Electric Power Association filed its petition for a cease and desist order against Mississippi Power & Light Company, then a Florida corporation but authorized to do business in Mississippi, since in

corporated in Mississippi, alleging the said Mississippi Power & Light Company had violated the provisions of Chapter 372, Mississippi Laws of 1956, by constructing, maintaining and operating certain electric lines and other electric facilities in an area in Hinds County, Mississippi, heretofore certificated to petitioner, and by serving and offering to serve prospective customers and by rendering street lighting service to the City of Jackson, all within the area previously certificated to said petitioner.

On October 27, 1960, respondent, Mississippi Power & Light Company filed its answer to the petition and set up in said answer certain affirmative matters by way of defense. The answer also contained a cross petition seeking certain relief against the petitioner.

On December 14, 1960, the City of Jackson filed a petition for leave of the Commission to intervene as a party to this proceeding.

On January 4, 1961, petitioner, Capital Electric Power Association, filed its answer to the petition of City of Jackson for leave to intervene as a party.

On January 4, 1961, petitioner, Capital Electric Power Association, filed its response to the affirmative matters contained in the answer of respondent, Mississippi Power & Light Company, motion to strike part of the affirmative matter contained in the answer, its answer to the cross petition, a special demurrer, a general demurrer, a motion to strike part of cross petition, and a motion to strike the cross petition as a whole.

On February 1, 1961, after hearings, the Commission entered an order sustaining the special demurrer and granting the motion to strike parts of the cross petition, but overruling the general demurrer, the motion to strike part of the affirmative matter in the answer, and the motion to strike the cross petition as a whole.

On February 7, 1961, the Commission entered an order sustaining petition of the City of Jackson to intervene as a party.

On February 7, 1961, the Commission issued an order overruling a motion of Mississippi Power & Light Company to strike.

On February 7, 1961, the Commission issued an order overruling general demurrer to petition of City of Jackson and an order overruling motion to strike petition to intervene filed by the City of Jackson.

On February 24, 1961, the City of Jackson filed an answer to the petition of Capital Electric Power Association, and incorporated in its answer a cross petition.

At this point there ensued a period of time when this cause was inactive awaiting the outcome of two cases which had been previously heard and decided by the Commission, and were then on appeal to the Courts. These cases were later decided by the Supreme Court of Mississippi on the appeals and are reported as follows: *Delta Electric Power Association* v. *Missippi Power & Light Company, et al.*, Miss. , 149 So. 2d 504, and *Capital Electric Power Association* v. *Mississippi Power & Light Company, et al.*, Miss. , 150 So. 2d 534.

On May 28, 1963, petitioner, Capital Electric Power Association, filed its response to affirmative matters in the answer of the City of Jackson, answer to the cross petition, general demurrer to the cross petition, special demurrer to the cross petition, motion to strike answer, and motion to strike cross petition.

On June 13, 1963, Mississippi Power Company filed a motion for leave to appear amicus curiae.

On June 14, 1963, the Commission issued an order granting Mississippi Power Company leave to appear amicus curiae.

On June 19, 1963, petitioner, Capital Electric Power Association, filed additional pleadings as follows: (a) motion to strike answer of respondent, Mississippi Power & Light Company; (b) motion to reconsider general demurrer to cross petition of Mississippi Power & Light Company, withdraw order overruling general demurrer and entered order sustaining said demurrer; (c) motion to strike answer of City of Jackson, Mississippi, intervenor, and (d) motion for preliminary hearing on its general demurrer to cross petition of the City of Jackson, Mississippi, intervenor.

On June 21, 1963, respondent, Mississippi Power & Light Company, filed a petition for leave to amend and supplement its answer.

On July 30, 1963, petitioner, Capital Electric Power Association, filed its answer to petition of Mississippi Power & Light Company, for leave to amend its answer.

On April 22, 1964, the respondent, Mississippi Power & Light Company, filed a petition for leave to file second amendment and supplement to answer of Mississippi Power & Light Company.

On April 24, 1964, the Commission held a hearing on all preliminary matters for the purpose of settling the pleadings. The Commission entered the orders on April 24, 1964 as follows:

(a) Order sustaining motion of Capital Electric Power Association to strike answer of Mississippi Power & Light Company.

(b) Order sustaining motion of Capital Electric Power Association to reconsider general demurrer to cross petition of Mississippi Power & Light Company, withdraw order overruling said general demurrer, and enter order sustaining said general demurrer, and the order sustaining said motion withdrew the former order and sustained said general demurrer.

(c) Order allowing time within which respondent Mississippi Power & Light Company might file motion for permission to plead further in this cause, said order being made pursuant to motion of Mississippi Power & Light Company made in open hearing and allowing time to and including May 5, 1964 within which said respondent Mississippi Power & Light Company might file a motion seeking permission to plead further. This time was by order further extended to and including May 15, 1964.

On April 21, 1964, no officers or counsel of the City of Jackson being present at the said hearing, the Commission on its own motion continued the hearing insofar as the City of Jackson was concerned, until the next regular meeting of the Commission to be held on May 5, 1964 at which time no officers or counsel of the City of Jackson being present, the hearing was resumed and pursuant thereto orders were entered as follows:

(a) Order sustaining general demurrer to cross petition of City of Jackson, Mississippi intervenor.

(b) Order sustaining motion of Capital Electric Power Association to strike answer of the City of Jackson, Mississippi, intervenor.

(c) Order allowing additional time within which Mississippi Power & Light Company, respondent, may file motion for permission to plead further.

(d) Order allowing time within which the City of Jackson, Mississippi, intervenor, may file motion for permission to plead further herein.

On May 15, 1964, respondent, Mississippi Power & Light Company, filed its petition for leave to file amended answer; the proposed amended answer was annexed to the petition.

On June 17, 1964, petitioner, Capital Electric Power Association, answered said petition and on June 23, 1964, after hearing, an order was entered by the Commission allowing the filing of said amended answer.

On June 24, 1964, respondent, Mississippi Power & Light Company, filed its amended answer to petition for cease and desist order.

On July 24, 1964, petitioner, Capital Electric Power Association, filed its response to affirmative matter in the amended answer of respondent, Mississippi Power & Light Company.

After a number of previous hearings, the cause then came on to be heard on the merits on July 31, 1964, upon the original petition of Capital Electric Power Association for a cease and desist order and the amended answer of Mississippi Power & Light Company, at which time oral and documentary evidence was presented in open hearing, all parties being present in person and represented by counsel, except City of Jackson, intervenor. The hearing was recessed and by appropriate order was resumed on August 7, 1964.

During the hearing on the merits on July 31, 1964, respondent, Mississippi Power & Light Company, filed a pleading of "Plea of Res Adjudicata" and asked permission that this pleading be received and filed; petitioner, Capital

tion 7; thence East 10 mile to the NE corner of the SW¼ of the SE¼ of Section 6, T5N, R1E; the point of beginning and all being situated in Hinds County, Mississippi.

No appeal was prosecuted from the said order of September 21, 1959, in Docket No. U-84, granting the said certificate of convenience and necessity to Capital Electric Power Association, and the time for such an appeal has long since expired.

(3) That on March 29, 1950, and continuously since said date, the petitioner, Capital Electric Power Association, has been rendering reasonably adequate electric service within the area particularly described in the preceding paragraph.

(4) That on November 25, 1959, the respondent, Mississippi Power & Light Company, was granted a partial or interim certificate of convenience and necessity authorizing its continued operation as an electric public utility in certain counties in the State of Mississippi, including Hinds County. Said certificate was granted in Docket No. U-11 and no appeal has been taken from the grant of such certificate, although the time for such appeal has long since expired. Said partial certificate authorized Mississippi Power & Light Company to continue its operation in the City of Jackson and other areas of the State. This certificate described the area certificated by particular metes and bounds description, but the area included in said certificate did not encompass or include any part of the territory particularly described in paragraph (3) of the finding of fact by the Commission. At the time of the original certificate was granted Mississippi Power & Light Company the said particularly described area lay adjacent to but outside the corporate limits of the City of Jackson.

(5) That the corporate limits of the City of Jackson were enlarged or extended effective March 17, 1960, so as to include, among other areas, the area particularly described above, which will be referred to as the "disputed area". Since said date of March 17, 1960, the disputed area has been a part of the City of Jackson.

(6) That Chapter CCCXLIII, Mississippi Laws of 1860, granted unto Jackson Gas Light Company a charter of incorporation; and Chapter 427, Mississippi Laws of 1888 granted an amendment to said charter. Chapter 424, Mississippi Laws of 1888, granted unto Light, Heat and Water Company of Jackson a charter of incorporation.

(7) That on October 31, 1946, respondent, Mississippi Power & Light Company, entered into an agreement with the City of Jackson to provide electric service to the City's municipal pumping plant and respondent has provided that service since that date.

(8) That on September 22, 1950, respondent, Mississippi Power & Light Company, entered into a street lighting contract with City of Jackson and respondent has served street lighting requirements of the City of Jackson under said contract since that date.

(9) That on May 16, 1956, the City of Jackson granted unto respondent, Mississippi Power & Light Company a nonexclusive municipal franchise for the rendering of electric service for a period of twenty-five years, which will expire May 15, 1981. Provisions of the franchise purport to grant to Mississippi Power & Light Company the right to use and occupy in, under, over, along, upon and across all streets, alleys and ways, bridges and public places and other municipal property in said municipality as they then existed or as hereafter might be laid out or extended during the life of the franchise and for the purpose of extend-

ing its system beyond the limits of the municipality as they might then or thereafter exist for the purpose of conducting its electric utility business.

(10) That on January 3, 1928, the Board of Supervisors of Hinds County, Mississippi, granted unto respondent, Mississippi Power & Light Company, a nonexclusive franchise for a period of ninety-nine years to construct, own and operate a plant or plants and a system for the manufacture and distribution of electric current for all purposes within said county; and an easement for the erection of lines and other facilities on the rights of way of streets, alleys, bridges and other public places, provided such facilities were not to interfere with the proper use of such rights of way and public places.

(11) That on October 5, 1938, the Board of Supervisors of Hinds County, Mississippi, granted unto petitioner, Capital Electric Power Association, a franchise or easement to erect, construct, operate and maintain electric power lines for the distribution of electric energy along, upon, over and across the public highways of Hinds County, Mississippi, provided such lines were placed on said highways in such manner as not to interfere with the rights of the public in the use thereof.

(12) That on February 10, 1939, the Board of Supervisors of Hinds County, Mississippi, granted unto petitioner, Capital Electric Power Association, a franchise or easement to construct, maintain and operate electric power lines and other related facilities over and across all properties of said county over which the Board has jurisdiction, except the property on which the courthouses are located, including the right to trim trees, etc., provided power lines and other facilities should be located in such manner as to form the least possible interference with the proper and appropriate public use of said property.

(13) That petitioner, Capital Electric Power Association, provided the first electric service that was ever rendered in the disputed area in the year 1939. From that date to this date it has provided to the disputed area adequate and dependable electric service for all purposes and is able and willing to continue doing so in the future. It now has in the disputed area considerably more than 200 service locations, consisting of residential, commercial, industrial and miscellaneous other types of services.

(14) That prior to June, 1960, no other electric utility had ever at any time served any part of said disputed area except respondent, Mississippi Power & Light Company, had connected six miscellaneous widely scattered services therein, which services were "frozen" when said area was adjudicated as being grandfather service area of petitioner by the aforesaid order of September 21, 1959, in Docket U-84.

(15) That respondent, Mississippi Power & Light Company, has since June, 1960, built electric distribution facilities and provided services and offered to provide services in the disputed area as follows:

(a) Sometime in June, 1960, respondent extended its service line from its distribution line (which distribution line is located within its own certificated area under Docket No. U-44) to a temporary service pole located approximately 50 feet within the disputed area at 3051 Lynch Street and installed upon said temporary service pole a meter and from such facilities provided construction power for the construction of a business building owned by J. S. Barlow, Jr., and which was being erected to house the business of said owner to be known as "Barlow's Boat Center". Said construction service was provided by respondent from the time of installation in June, 1960 to August 16, 1960. On August 16, 1960, respondent removed said construction service fa-

cilities and constructed and installed a 3-phase quadruplex service line from its aforesaid distribution line to the side of the said building, installed its meter and connected permanent type 3-phase electric service to serve all of the requirements of said location of the said J. S. Barlow, Jr., doing business as Barlow's Boat Center. Said permanent type service so installed is located at a point approximately 100 feet within the disputed area.

(b) On or about September 2, 1960, respondent began the construction of single phase lines along Lynch, Craft, Burch, Washington, Booker, McLean, Dewey and Gibraltar Streets in said area, and by September 12, 1960, had completed approximately 4900 feet of such line and installed thereon 30 street lights. Said distribution lines duplicated at all points the distribution lines of petitioner, which were already in place and in operation on each and all of said streets and had been so in place and in operation since, on and prior to the effective date of the Act, March 29, 1956. All of this construction was within the disputed area.

(c) On or about September 29, 1960, at a location in the 3000 block of Lynch Street in said disputed area respondent connected service for Campbell Construction Company, a building contractor, for use in the construction of a building at that location.

(d) Respondent continued to build facilities, offer services and provide services which are summarized in Exhibit 3 in the evidence, resulting in services being rendered in the numbers, of the types, for the consumers and at the addresses as shown in said Exhibit 3, all within said disputed area.

(16) That Mississippi Power & Light Company, unless ordered to cease and desist therefrom, will offer and

render electric distribution service to customers and service locations within the disputed area, and will continue to render electric service to the customers now being served. It will also continue rendering street lighting services within the disputed area unless ordered to cease and desist therefrom.

(17) That a cease and desist order should be issued commanding and requiring Mississippi Power & Light Company to cease and desist from rendering electric service in the disputed area, including street lighting service. Such cease and desist order should also require Mississippi Power & Light Company to remove within a reasonable period of time all of its electrical facilities which it has constructed within the disputed area since the effective date of the Act, March 29, 1956.

From the foregoing statement of facts it is evident that the real issue in this controversy is whether or not the certificate of convenience and necessity issued by the Public Service Commission is entitled to be protected against the invasion of the certificated area by the construction and operation of electric facilities for the purpose of rendering service in said area by another electric utility which does not have a certificate to serve the disputed area.

We do not consider the above referred to laws granting corporate charters, the municipal franchise, street lighting contract, pumping plant contract or Hinds County franchises, to be germane to any of the issues in this cause. Therefore, we disregard them completely as we believe they have no bearing on this case. The Commission, however, does not decide on the validity of any of the acts of the Mississippi Legislature referred to granting of corporate charters, municipal franchise of the City of Jackson, Hinds County franchises, the street lighting contract

or pumping plant contract of the City of Jackson, nor attempt to interpret or construe any of their provisions. The Commission's decision is based solely upon the rights arising out of the certificates of convenience and necessity granted the two utilities in Docket No. U-44 and U-84. The first certificate does not include the disputed area. The second certificate does include the area in dispute.

The Supreme Court case of *Capital Electric Power Association* v. *Mississippi Power & Light Company*, ... Miss. ....., 150 So. 2d 534, decided that a certificate of convenience and necessity granted a utility is a valuable right which can be protected in the Courts. In deciding the case, the Court held:

> "As stated by the Court in the opinion rendered in the Delta Electric Power Association case prior decisions interpreting the Public Utilities Act have established two propositions: (1) Awards by the Commission of 'grandfather' certificates under Section 5, are made on an area rather than a facility basis; and (2) A certificate of convenience and necessity issued by the Commission is a valuable right which is entitled to protection by the Courts. Capital Electric Power Association v. Mississippi Power & Light Company, 240 Miss. 139, 125 So. 2d 739; Mississippi Power Company, et al. v. East Mississippi Electric Power Association and Public Service Commission, ... Miss. ....., 140 So. 2d 286."

The answer of respondent suggested that other persons should be made parties to this proceeding, but the Commission is of the opinion that none of them are necessary parties.

The Commission is of the opinion that the Plea of Res Adjudicata filed by respondent, July 31, 1964, is not well taken and should be overruled.

IT IS, THEREFORE, ORDERED that:

(1) The petition for cease and desist order filed by Capital Electric Power Association be and the same is hereby granted.

(2) Mississippi Power & Light Company be and it is hereby commanded, required and ordered to cease and desist from rendering any electric distribution service or street lighting services in the disputed area, other than the six scattered miscellaneous services which it was rendering in the disputed area on the effective date of the Act or such of them as continue to be active services.

(3) Mississippi Power & Light Company be and it is hereby commanded, required and ordered to remove all of its electric lines and facilities which it has constructed subsequent to the effective date of the Act, March 29, 1956, and is now operating or maintaining within the disputed area, within a period of thirty (30) days from the date of this order.

(4) The Plea of Res Adjudicata filed herein by Mississippi Power & Light Company be and the same is hereby overruled and denied.

(5) This order shall be and is effective from and after the date of its issuance.

ORDERED by the Commission this 6th day of October, 1964.

/s/ E. W. Robinson,
E. W. Robinson,
Executive Secretary

(Seal)

BES/et

CC: Mississippi Power & Light Company
Capital Electric Power Association
Hon. T. Harvey Hedgepeth
Hon. Sherwood W. Wise
Hon. Allen C. Thompson
Hon. E. W. Stennett
Hon. Garner W. Green

APPENDIX D

§ 7716-05. Certificate of public convenience and necessity; when required.

No person shall construct, acquire, extend or operate equipment for manufacture, mixing, generating, transmitting or distributing natural or manufactured gas, or mixed gas, or electricity, or water, for any intrastate sale, to or for the public for compensation, or for the operation of a public utility operating a business and equipment or facilities as contemplated by subsection D (3) of section 1 [§ 7716-01], of this act, without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require the operation of such equipment or facility.

(a) Provided, however, nothing herein shall be construed to require any certificate of convenience and necessity from the commission for the production and gathering of natural gas, the sale of natural gas in or within the vicinity of the field where produced, the distribution or sale of liquefied petroleum gas, or for the facilities and equipment utilized in any such operations.

(b) The commission shall issue a certificate of convenience and necessity to any person engaged in the construction or operation of such equipment or facility on the effective date of this act, for the construction or operation then being conducted, without requiring proof that public convenience and necessity will be served by such construction or operation, and without further proceedings, if application for such certificate is made to the commission within six (6) months after the effective date of this act; and pending the filing of any such application and the issuance of a certificate, the continuance of such construction or operation shall be lawful. Any utility covered by

this act which has heretofore been under the jurisdiction of the Mississippi Public Service Commission shall, upon application within six (6) months of the effective date of this act, be issued a certificate authorizing it to conduct operations and make extensions within any area covered by its service area map or maps on file with the Mississippi Public Service Commission on the effective date of this act.

(c) In all other cases the commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the commission; provided, however, no certificate shall be required for extensions or additions within the corporate limits of a municipality being served by the holder of a certificate of convenience and necessity, and provided further, that the commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section: (1) temporary acts or operations for which the issuance of a certificate will not be required in the public interest; and (2) extensions or additions of service facilities outside of municipalities under such general rules as will promote the prompt availability of such service to prospective users, and at the same time prevent unnecessary and uneconomic duplication of such facilities as between two (2) or more persons.

(d) Where there shall be two (2) or more persons holding certificates of convenience and necessity for similar operation in the same municipality, such operation may be carried on by such persons within their respective certificated areas and such persons shall be exempt from

further application to the commission for extension of or additions to their facilities within their respective certificated areas of said municipality, including any extensions of the corporate limits thereof.

When more than one utility, including co-operatives, operate within a municipality all such utilities, including co-operatives, shall be subject to rate regulation therein. Provided, further, that municipally operated utilities shall not be subject to regulation under this act.

(e) In addition to such other rights as it may have to use the streets, alleys and public places of a municipality, a public utility which holds a certificate of public convenience and necessity granted under the provisions of this act covering the geographical area of such municipality, and which (1) is operating under a municipal franchise on the effective date of this act, or (2) shall have previously operated under such a municipal franchise which has expired within five (5) years prior to the effective date of this act, or (3) which shall hereafter operate under a municipal franchise hereafter granted, may, after the expiration of any such franchise continue to use the streets, alleys and public places therein situated upon condition that (1) such utility shall pay the said municipality compensation therefor at the rate of two per cent (2%) of said utility's gross revenues from sales to residential and commercial customers within said municipality, in case of a utility defined in section 1 D (1) and 1 D (2) [§7716-01] and in the case of a utility defined in 1 D (3) [§7716-01] the said utility shall pay two per cent (2%) of the monthly service charges in said municipality whether said utility has a franchise to operate therein or not, such payments to be made quarterly of each year after the effective date of this act, and (2) that after the expiration of such franchise the municipality, or any customer of such utility in such municipality, upon appropriate petition, shall be en-

titled to a hearing as to whether or not the certificate of convenience and necessity may then and thereafter be granted on a permanent basis as herein set out. Any co-operative which shall operate within any area of a municipality shall likewise pay such municipality two per cent (2%) of the co-operative's gross revenue from sales to residential and commercial customers within said municipality. Any municipality shall have the right to acquire by purchase, negotiation or condemnation the facilities of any utility that is now or may hereafter be located within the corporate limits of such municipality.

(f) The commission may, after a hearing had upon due notice, make such findings as may be supported by proof as to whether any utility holding a certificate under the provisions of this act is rendering reasonably adequate service in any area covered by such utility's certificate, and in the event the commission finds that such utility is not rendering reasonably adequate service the commission may enter an order specifying in what particulars such utility has failed to render reasonably adequate service and order that such failure be corrected within a reasonable time, such time to be fixed in such order. If the utility so ordered to correct such failure fails to comply with such order of the commission and the commission finds that cancellation of its certificate would be in the best interest of the consuming public served by the holder of the certificate, its certificate for the area affected, may be revoked and cancelled by the commission.

(g) Notwithstanding any provision herein to the contrary, in any case where a utility is located and operates, or proposed to locate and operate in a municipality where streets and other public places are essential to such location and operation, no certificate of convenience and necessity shall be issued thereasto without prior franchise

granted by the municipality; provided, however, such franchise shall not contain any provision conflicting with or repugnant to the exclusive jurisdiction of the commission to regulate rates and services of the utilities as herein provided. Applicants for certificates of convenience and necessity as provided for under section 5 [this section] hereof shall attach to their applications true and correct copies of franchises issued to them by such municipality as the application may embrace, and the commission is authorized so to amend such franchises as to exclude and remove therefrom any provision in conflict with or repugnant to the exclusive jurisdiction of the commission over rates and services and which shall in any way fix or affect rates. Provided, however, should any municipality arbitrarily refuse to grant a franchise or provide for an election for a franchise as provided by law to a utility now operating within said municipality within ninety (90) days after application for said franchise is made, then the utility may obtain a certificate of convenience and necessity without the necessity of first obtaining a franchise; and the said commission shall so issue said certificate of convenience and necessity upon proper showing by the utility that said franchise is being arbitrarily withheld.

In the event the commission shall rule that a franchise is being arbitrarily withheld and shall issue a certificate of necessity as hereinabove mentioned, the utility obtaining said certificate of convenience and necessity shall not be required to pay to said municipality the two per cent (2%) hereinabove provided until such a franchise has been granted to said utility.

In the case of a public utility as defined in section 1 D (3) [§7716-01] which has heretofore been under the jurisdiction of the Mississippi Public Service Commission and has its service area maps on file with the commission on

the effective date of this act, under such reasonable rules and regulations as the commission shall prescribe, the commission is authorized to issue to such utility a certificate of convenience and necessity without requiring such utility to first obtain a municipal franchise as herein provided.

SOURCES: Laws, 1956, ch. 372, §5.

APPENDIX E

Laws of Mississippi of 1860, Chapter CCCXLIII.
"AN ACT to incorporate the Jackson Gas Light Company.

"WHEREAS, gas works have been erected in the City of Jackson, and are now in successful operation, and whereas the owners of said gas works are desirous of forming a joint stock company.

Therefore.

"Section 1. Be it enacted by the Legislature of the State of Mississippi, that William T. Withers, E. M. Yerger, and William A. Withers, and their successors, be and are hereby constituted a body politic and corporate, under the name of the 'Jackson Gas Light Company,' and as such may sue and be sued, plead and be impleaded, and have and exercise all the rights and privileges which are usual to corporations within the scope and design of its creation.

"Sec. 2. Be it further enacted, That said Jackson Gas Light Company be and is hereby authorized to acquire and hold such real estate as may be necessary for its own use and the conveyance from the mayor and aldermen for the City of Jackson, to William T. Withers, of one hundred and fifty, by one hundred and forty feet, square off of the north-west corner of square number nine south, in the City of Jackson, usually known as Market

or City Hall square, as a location for said gas works, be and the same is hereby approved and ratified.

"Sec. 3. Be it further enacted, That the capital stock of said company is hereby fixed at the sum of thirty-six thousand dollars, to be divided into shares of one hundred dollars each, and the board of president and directors hereinafter mentioned, shall cause certificates of stock to be issued to the stockholders, signed by the president, and countersigned by the secretary of the company, which shall be transferable only on the terms and conditions that may be imposed by the board of president and directors: The capital stock may be increased from time to time, at the option of the board of president and directors, to sixty thousand dollars, as additions to the gas works, or extensions of pipe may be made.

"Sec. 4. Be it further enacted, That the affairs of said gas light company shall be managed by a board composed of one president and two directors, who shall be elected by the stockholders of the company in the month of January, of each year, and shall hold their office for the term of one year from the date of their election, and until their successors are elected and enter on the discharge of the duties of their office: until an election is held, said E. M. Yerger shall act as president, and William T. Withers and William A. Withers, as directors of said gas light company; said board of president and directors, or a majority of them, shall make all needful rules and regulations for the management of said gas works, and fix the terms and conditions on which gas will be supplied to consumers.

"Sec. 5. Be it further enacted, That this act shall take effect and be in force from and after its passage.

"Approved, Feb. 10, 1880."

APPENDIX F

LAWS OF 1888, Chapter 427

AN ACT to Amend The Charter of the Jackson Gas Light Company.

SECTION 1. Be it enacted by the Legislature of the State of Mississippi, That the charter of the Jackson Gas Light Company be and the same is hereby amended as follows: The said Jackson Gas Light Company is fully authorized to construct, own and operate an electric light and power plant in the city of Jackson, in connection with the present gas plant; and it is fully authorized and empowered to erect poles along and through the streets and alleys of said city on which to suspend its wires, lamps and other appurtenances; provided, that nothing herein contained shall be construed as legalizing said company's occuaption of a part of Market Square, if the same has not already been legalized.

SECTION 2. Be it further enacted, That said company may also erect a fuel gas plant for supplying fuel gas through its present pipes, or through other pipes to be laid in and through the streets and alleys of said city; said fuel gas to be sold for fuel and other purposes in connection with incandescent gas burners.

SECTION 3. Be it further enacted, That said company is further empowered and authorized to buy, sell and generally deal in gas fixtures, gas pipes, gas burners, electric lamps, electric motors and all pipes and apparatus of any and all descriptions used in lighting by gas or electricity, or in supplying power or in supplying heat by means of gas or electricity; provided, it pays privilege taxes as other dealers.

SECTION 4. Be it further enacted, That said company is fully empowered and authorized to deal in and transact the business of plumbers, gas, steam and water-fitters, and deal in all such supplies.

SECTION 5. Be it further enacted, That this act take effect and be in force, from and after its passage.

Approved March 7, 1888.

APPENDIX G

"AN ACT to incorporate the Light, Heat and Water Company of Jackson, Mississippi.

"SECTION 1. Be it enacted by the Legislature of the State of Mississippi, That P. W. Peeples, C. W. Robinson, R. L. Saunders, S. S. Carter, B. Lemly, I. Strauss, C. A. Lyerly, R. W. Millsaps, S. S. Calhoon and M. Green, their associates, successors and assigns, be and they are hereby made a body corporate under the name of the Light, Heat and Water Company of Jackson, Mississippi, with perpetual succession, and by that name may contract and be contracted with, sue and be sued, adopt a common seal and change the same at will, and do all other things necessary to the advantagous exercise of the franchises hereby conferred not inconsistent with the constitution of this State or of the United States.

"SEC. 2. Be it further enacted, That the capital stock of said company is one hundred thousand dollars, but the same may be increased or diminished at any regular meeting of the stockholders by a majority vote in value of the subscribed stock. That when, in the opinion of the corporators named herein, a sufficient amount of capital stock shall have been subscribed, upon the books of subscription opened by said corporators, to justify commencing business, said corporation may commence business.

"SEC. 3. Be it further enacted, That said company shall have power to own such lands and all such factories, reservoirs and mechanical devices or appliances as may be deemed proper by the directors of said company to conduct successfully said business and operate the franchises hereby conferred, and to locate them at points most advantageous to its business, and to manufacture and produce any and all kinds of artificial light and heat, whether made from fuel or power, electricity or otherwise; and to store and supply for public and private use water; and to sell such light, heat and water on such reasonable terms as said directors may from time to time establish, in the city of Jackson and its suburbs; and to own, use and operate all machinery, engines, conduits, wires, pipes and all appliances necessary or proper to the business of said company. That the right-of-way over all the streets and alleys of the city of Jackson and the public roads adjacent thereto is hereby granted said company for its pipes, wires, poles and appliances for the purposes aforesaid and authority and right is hereby conferred on said company or its agents to dig the same, to lay their pipes beneath said streets and roads and to repair same, and to erect poles upon which to suspend their wires or lights, but such pipes and poles and wires must be so arranged that the use of said streets and roads as public highways shall not be materially impaired; that said company may buy, sell and deal in for profit, all the appliances to its said business and also do gas-fitting and plumbing for hire.

"SEC. 4. Be it further enacted, That said company shall have all the powers set forth in the act entitled 'an act to extend the provisions of chapter 38 of the Code of 1880, in relation to corporations and other associations and for other purposes, approved March 7, 1882.

"SEC. 5. Be it further enacted, That said company hereby incorporated shall have power to purchase or lease

any property or appliances of any other company or person deemed necessary by said directors for the advantage of the business of this company and the exercise of the franchises hereby conferred, upon such terms as may be agreed upon by the contracting parties, and to consolidate with any other corporation created for cognate purposes, and power is hereby conferred upon the company hereby created as well as upon the other, selling, leasing or consolidating company or companies to make such sale, lease, or consolidation, with the company hereby created upon such terms as may be agreed upon, such agreement of sale, lease or consolidation to be recorded in the office of the clerk of the Chancery Court of Hines County, First District, in the records of deeds; that in case the said directors may desire to issue bonds, the pay for such property so acquired by sale, lease or consolidation, the company hereby created shall have full power and authority to execute and issue negotiable interest bearing bonds for the same and to secure them by a deed of trust, with power of sale, upon the property of the company hereby created.

"SEC. 6. Be it further enacted, That said company hereby created shall have power to charge and collect such reasonable rates for lights, heat and water as may be established from time to time by the directors.

"SEC. 7. Be it further enacted That if necessary, in the judgment of said directors, to place their water-mains, pipes or reservoirs, through or on private property, and the owner and the company cannot agree upon the value to be paid for its use, or if the owner is a minor or unknown or absent from the county, then power is hereby conferred upon said company to condemn such parts thereof as may be required by said company as provided by section 8 of the act approved March 10, 1852,

entitled 'an act to incorporate the Mississippi Central Railroad Company,' with all the rights and powers therein provided and upon payment or tender of the amount so ascertained to be the value thereof, to the owner, when known, or payment, to the clerk of the Chancery Court of Hinds County of said sum when the owner is unknown or absent, vest in fee simple in said company.

"SEC. 8. Be it further enacted, That this act take effect and be in force from and after its passage.

"Approved February 23, 1888."